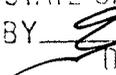


COURT OF APPEALS  
DIVISION II

Court of Appeals No. 32839-9-II

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STATE OF WASHINGTON  
BY  DEPUTY

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

*In re the Marriage of:*

**JOAN HELEN WRIGHT,**

*Appellant,*

*And*

**ROBERT DWAYNE WRIGHT,**

*Respondent*

**BRIEF OF RESPONDENT**

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**ORIGINAL**

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**STATEMENT OF FACTS**

The parties were married on December 29, 1980. [CP 147] Mrs. WRIGHT [hereinafter, “JOAN” or “wife”] was age 59 during the pendency of this divorce. [CP 1] ROBERT was age 61 during the pendency of this divorce. [CP 1] JOAN has variously been described as as “a hard worker in the business, both before and after her accident” [CP 583], “a very independent woman [CP 527], “very intelligent” [CP 485] and “a straight A student” [CP 486].

JOAN filed for divorce on September 15, 2003 after having removed herself from the family home on June 27, 2003 with no notice to Mr.

WRIGHT [hereinafter, "ROBERT" or "husband"]. [CP 147, 168, 105] JOAN hired and consulted with an attorney prior to her move out. [CP 486] JOAN was represented by an experienced family law attorney throughout her divorce proceedings, from the beginning to conclusion. [CP 590-91] Besides JOAN's claims for spousal maintenance and contribution towards attorney's fees, the significant assets of the WRIGHT marriage, which were the subject-matter of this divorce, included a family home, which was remodeled during the marriage to suit as base of operations for the family catering business. [CP 33] The other significant assets of the marriage included the catering business, a closely held corporation, which did business as "R&B Catering, Inc.". [CP 14], ROBERT's 401(k) valued at \$44,326 [CP 2] and various and sundry checking accounts and vehicles. [CP 5]

The personal relationship between JOAN and ROBERT during the marriage was strained by differences of opinion on how best to run the catering business. [CP 484-85, 527, 582] This situation was exacerbated by JOAN's habit of consumption of alcohol during office hours, as well as arguments about her gambling. [CP 493, 529, 583] Remarkably, despite these problems, JOAN was a key employee/partner in the catering

business, handling most of the accounting, bookkeeping, marketing and client relations, while ROBERT actually cooked the food, handled the logistics of setup and cleanup and worked the catering events. [CP 584, 171, 173-74]

Prior to there being any marital difficulties, JOAN suffered serious injuries in a motor vehicle collision that had occurred on January 16, 2002. [CP 481]. She retained a net settlement from a claim made upon the marital community automobile insurance company (PIP and UIM coverages) in the sum of over \$100,000, representing the policy limits of the UIM coverage [CP 482], which fund was still intact at the filing of the divorce. The person who was at fault in JOAN's automobile collision was not only uninsured, but was a convicted felon and had no assets from which JOAN could collect anything but the policy limits of her own insurance policy. [CP 483] Prior to their separation, ROBERT actively assisted JOAN in not only the settlement with their insurance company, but also in the investigation of the tortfeasor, consultation with an attorney, negotiation, compromise and settlement of over \$63,000 in medical bills. [CP 483] The total medical bills were compromised to about \$48,000, and paid with the \$25,000 PIP coverage policy limits and

about \$23,000 of additional community funds without touching the \$100,000 uninsured motorist coverage that had been paid out and without incurring any attorney's fees. [CP 482] The characterization of a portion of this settlement was another issue in the divorce.

When JOAN filed for divorce, she also filed a motion seeking temporary spousal maintenance with her initial pleadings, which issue was reserved by the Commissioner in October, 2003. [CP 491] She submitted the written report of Katherine Brzezinski-Stein, dated August 15, 2002, more than a year prior to her divorce filing, as a ground for the motion seeking spousal maintenance. [CP 491] Other than this one report, throughout these divorce proceedings, there are no other documented medical or psychological reports or records documenting mental health care treatment of any kind other than the previously mentioned divorce counseling administered by Lori Harrison. The next reference to any kind of mental health treatment for JOAN arises less than one month after the divorce settlement is obtained, when JOAN begins to consult with several professionals after the fact. [CP 488]

The parties concluded their divorce in the Pierce County Superior Court by entering into a written CR 2A Stipulation on August 19, 2004.

[CP 13-18]. This constituted a full and final compromise and settlement of all issues then pending in their divorce case. [CP 94] The final Findings of Fact, Conclusions of Law and Decree of Dissolution based upon said Stipulation was entered on January 7, 2005. [CP 146-163]. In the interim, the Appellant filed the first motion to vacate the divorce stipulation on September 14, 2004, [CP 20-82] which was not brought before the trial court for oral argument and decision until November 19, 2004. The basis for the first motion to set aside the CR 2A Stipulation was that it was "based upon fraud by husband regarding assets" and "bad faith" negotiation of settlement, referring to items of personal property that allegedly no longer existed. [CP 32].

JOAN's attorney issued a Subpoena for a records deposition to Commercial Federal Bank the day before the case settled at the Settlement Conference and after the discovery cutoff deadline had passed, on August 18, 2004. [CP 35-37]

The records produced pursuant to this Subpoena reflected not only that there was an account which bore the names of both ROBERT and his mother, Virginia M. Wright. These records also documented several transactions of money in and out of the account over several years. [CP

38-65] Despite JOAN's claim that she knew nothing of this account or these transactions as a basis of fraud, it was argued that ROBERT's mother was a woman of substantial means [RP, 11/19/04, p. 13, lines 12-20], that the account belonged to Virginia entirely [CP 90], that ROBERT's name was on the account merely as an estate and tax planning precaution [CP 107], that Virginia had given ROBERT and JOAN many loans and gifts of cash over the years [RP, 11/19/04, p. 12, lines 13-18], and that \$95,577.54 was given by Virginia to pay-off the mortgage on the family home in 2001 [CP 64, 107]. Witness Shirley I. Reynolds recalls seeing JOAN's endorsement on all of the checks issued by Virginia Wright for loans and gifts. [CP 107]

This first Motion to Set Aside was denied by the Honorable Katherine Stolz on November 19, 2004 [CP 114 – 120][RP, 11/19/04 pp. 2-16] The Respondent was awarded \$300.00 in attorney's fees against the Appellant, as a part of the ruling of the court. [CP 117-118], [RP, 11/19/04, p. 14, lines 1 – 4].

Other than a fleeting reference to the fact that her motor vehicle collision "left me with a dyslexia problem", JOAN did not raise any issue of any serious mental incapacity to contract the CR 2A Stipulation in any

of her paperwork filed in support of the first motion to vacate. [CP 170, 530] This, despite the fact that her first motion to vacate was supported by a written declaration submitted by her counselor, Lori Harrison, who opined that “Ms. Wright has been dealing with issues of emotional abuse during the marriage, grief, loss, anxiety and depression, as well as loss of her identity, since she was or ‘believed’ herself to be an integral part of the family’s catering business.” [CP 20-21] There is no reference to any significant mental disability due to JOAN’s auto collision in this declaration filed less than a month after JOAN settled her divorce.

Armed with a set of new attorneys, JOAN filed a second Motion to Vacate or Set Aside the Findings, Conclusions, Decree and the CR 2A Stipulation upon which they were based, which was filed on June 22, 2006. [CP 423 – 478]. The basis for this Motion to Vacate was, apparently, upon allegations of mistake or misunderstanding between JOAN and her then attorney, JOAN’s alleged mental incapacity, alleged excusable neglect, alleged irregularities and that the Decree is void. [CP 446 – 472] This Motion was likewise denied by Judge Stolz on July 14, 2006. [RP, July 14, 2006, pp. 2-23.

## STATEMENT OF THE ISSUES

1. Did the trial court abuse her discretion in denying JOAN's motion to vacate based upon alleged fraud and bad faith?
2. Did the trial court abuse her discretion in denying JOAN's motion to vacate the divorce decree based upon JOAN's alleged mental incapacity?
3. Did JOAN waive her claim that it was improper for the trial judge to fail to recuse herself from both motions to vacate by failing to request recusal at the lower court hearings?
4. Is either or both of JOAN's motions to vacate time barred?
5. Should JOAN be permitted to raise the issue of ROBERT's alleged breach of fiduciary duty by alleged failure to disclosed JOAN's mental incapacity for the first time on appeal?

## ARGUMENT

### 1. *Motion on the Merits.*

A "Motion on the Merits to Affirm" is submitted with this Brief. This Brief is being submitted also as ROBERT's "Brief on the Merits", and is incorporated therein by its reference thereto, to be considered in

conjunction with the "Motion on the Merits to Affirm". RAP 18.14 permits the court to consider a Motion on the Merits to affirm the ruling of the trial court that are the subject of an appeal at any time after the appellant's brief has been filed. RAP 18.14 (e)(1) states, in pertinent part, that:

A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court...

The Appellant's appeals herein are clearly without merit and the trial court's rulings should be affirmed.

*2. Judicial Policy Favors Finality of Decrees.*

CR 2A of the Washington Superior Court Civil Rules, provides in pertinent part:

No agreement or consent between the parties or attorneys in respect to the proceedings in the cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court before a court reporter, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

It is clear that the issues before the court are controlled by well-settled law that favors the amicable settlement of disputes, which courts are inclined to view with finality. Wool Growers Serv. Corp. v. Simcoe Sheep Co., 18 Wn.2d 655, 690, 140 P.2d 512, 141 P.2d 875 (1943). There is no difference in the context of divorce settlements. Peste v. Peste, 1 Wash.App. 19, 25, 459 P.2d 70(1969).

A trial court has the discretion to relieve parties from stipulations when such relief is necessary to prevent injustice and when the adverse party has not relied on the stipulation to its disadvantage. Baird v. Baird, 6 Wash.App. 587, 494 P.2d 1387(1972). A judgment by stipulation can be overturned on a showing of fraud, mistake or misunderstanding. Washington Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 316 P.2d 126(1957). However, the mistake or misunderstanding must be mutual, and not merely the unilateral mistake or misunderstanding of one party to the agreement. Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302(1978). The Court in Graves v. P.J. Taggares Co., 25 Wash.App. 118, 605 P.2d 348(1980) , cited approvingly the case of Snyder v. Tompkins, 20 Wash.App. 167, 579 P.2d 994(1978) . The Snyder court held that:

We subscribe to the principle that a person attempting to dislocate an in-court settlement of a claim has the burden of showing that the agreement was a product of fraud or overreaching.

Id., 579 P.2d at 998.

The judicial policy was aptly stated as follows:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal.

Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them.

The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. [Citations Omitted]

In re the Marriage of Landry, 103 Wn.2d 807,809 699 P.2d 214(1985)

3. *Legal Standard for Vacating Consent Decrees.*

Haller v. Wallis, *supra*. is one of the leading cases on motions to vacate judgments entered by agreement of the parties. The Haller case distinguishes a motion to vacate in cases where judgment is taken by default versus cases where judgment is entered by consent or agreement between the parties. A different standard applies to consent judgments because of the strong judicial policy favoring settlements and, also,

supporting the finality of settlements. The Haller court, citing approvingly from another treatise on judgments, quoted in pertinent part, as follows:

[i]f [the judgment] conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect. Neither is an error or misapprehension of the parties, nor of their counsel, any justification for vacating the judgment . . . Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it. (Citations omitted)

Thus, it would take more than a CR 60(b)(1) motion to vacate a consent decree. Further, policy reasons favoring the finality of divorce settlements were set forth in Peste v. Peste, 1 Wn. App. 19, 25, 459 P.2d 70 (1969):

To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses.

An amicable agreement settling a civil case is binding on the parties and will not be reviewed on appeal unless the party contesting it can show that the stipulation was a product of fraud or that the attorney

overreached his authority. Washington Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 316 P.2d 126, 69 A.L.R.2d 752 (1957); Cook v. Vennigerholz, 44 Wn.2d 612, 269 P.2d 824 (1954). Again, in Haller, *supra*, the court affirmed a trial court's refusal to vacate a consent judgment, ruling that once a client has designated an attorney to represent him, the court and other parties to the action are entitled to rely upon that authority until the relationship is terminated.

This court should follow Haller and apply its well-reasoned logic to this case: (1) the law favors finality, 89 Wn.2d at 544; (2) erroneous advise of counsel, error of counsel, surprise, or excusable neglect are not grounds to set aside a consent judgment (a settlement approved in court), 89 Wn.2d at 544; (3) fraud provides the grounds to vacate nondefault judgments, 89 Wn.2d at 546; (4) attorney mistake or negligence does not provide an equitable basis for relief for the client, 89 Wn.2d at 547. See: Lane v. Brown & Haley, 81 Wn.App. 102, 912 P.2d 1040(Div. II, 1996)

A trial court's determination that the parties fully appreciated the terms of the settlement will not be disturbed where it is supported by the evidence. Baird v. Baird, 6 Wn. App. 587, 494 P.2d 1387 (1972). It has also been held that when a party voluntarily absented herself from the

courtroom during the oral stipulation, said conduct indicated that she acquiesced in the settlement. See In Re Houts, 7 Wn. App. 476, 499 P.2d 1276 (1972). When an attorney appears in court and represents that their client has agreed to a proposed settlement, it must be presumed that the attorney acted within the scope of his or her authority as that party's attorney. State Ex Rel. Eastvold v. Superior Court, 48 Wn.2d 417, 424, 294 P.2d 418 (1956). If the rule were otherwise the judicial process would be fouled with uncertainty. See: Fite v. Lee, 11 Wn. App. 21, 521 P.2d 964 (1974).

4. *CR 60(b)(4) Motion to Vacate.*

Motions to vacate under CR 60 are reviewed for an abuse of discretion. Morgan v. Burks, 17 Wn. App. 193, 197, 563 P.2d 1260 (1977). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Such motions are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion, i.e., only when no reasonable person would take the position adopted by the trial court.

Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 584, 599 P.2d 1289 (1979); Haller v. Wallis, *supra*; Morgan v. Burks, *supra*.

The party making a CR 60(b)(4) motion to vacate must prove that the judgment or decree was procured through fraud, misrepresentation or other misconduct of an adverse party. However, at the time of the first motion, there was no final judgment or decree entered. The first motion was directed at the validity of the CR 2A Settlement agreement itself. Fraud and misconduct was primarily the basis of the first motion to vacate in this case, although JOAN continues to raise new allegations of ROBERT's "misconduct" with every new pleading and brief being filed in this case. Aside from the issue of ROBERT's alleged fraud or misrepresentation, JOAN's original, and only, allegation of ROBERT's "misconduct" involved alleged bad faith in agreeing that she would receive certain articles of personal property in the property settlement that were allegedly missing or no longer existed.

The record reveals lengthy, controverted declarations as to what occurred on September 1, 2004 when JOAN returned to the family home following the divorce settlement to make an inventory of additional items of personal property she was awarded in the settlement. [CP 166-169, 88-

90, 101, 105] The record is clear that JOAN was given access to the family home to make an inventory of items that she wanted, even by her own account. She and her witness also signed and dated a written inventory of said items as called for by the divorce settlement. [CP 99] The procedure for resolving factual issues as to whether there were additional items, or disputes about the personal property exchange was contemplated and set forth in writing in the divorce settlement. [CP 96-97] It was alleged that JOAN had previously loaded up a large amount of personal property in U-Haul vans on two prior occasions (June 27, 2003 date of separation and October 25, 2003 pursuant to temporary order) during the pendency of the divorce. [CP 105] Even the trial court remarked in her ruling that that just such issues regarding existence of property awarded under a divorce decree were commonplace in divorce cases. [RP, November 19, 2004, p. 12, lines 23-25 through p. 13, lines 1 - 9] These issues were contemplated in the divorce settlement and cannot now be the basis of a “bad faith” claim of misconduct against ROBERT.

JOAN also couched her motion to vacate upon the issue of ROBERT’s alleged fraud and misrepresentation. JOAN’s theory is that, at the time of settlement, ROBERT failed to disclose a bank account in Oklahoma which

was in the name of he and his mother. There is no other claim of fraud, misrepresentation or fiduciary failure to disclose any other asset. On the other hand, ROBERT claims that JOAN already knew that, although his name was on the account, the money in the account belonged solely to his mother, Virginia Wright. [CP 90] This claim was supported by the declaration of his sister, Shirley J. Reynolds who had an intimate knowledge of her mother's accounts and financial holdings. [CP 107] JOAN herself acknowledged that putting both of their names on the account in a disjunctive manner was done as a matter of informal estate planning. [CP 183]

It was brought to the attention of the trial court at the hearing on the first motion to vacate, that JOAN had filed two prior declarations in the divorce case discussing the transactions ROBERT had with his mother. [RP, November 19, 2004, p. 7, lines 2-22] The undersigned specifically brought to the court's attention the declaration authored by JOAN and filed on September 30, 2003 and again on April 20, 2004, wherein JOAN admits knowledge of several financial transactions between ROBERT and his mother involving thousands of dollars. In fact, JOAN herself submitted a detailed, written synopsis of her various financial accounts to

her divorce attorney on June 17, 2004, more two months before the case settled. [CP 218-250 and 314-329]

However, it was not until **the day before** the CR 2A Stipulation was agreed to, on August 18, 2004, that JOAN's attorney issued a Subpoena to the bank regarding the Virginia Wright account. [CP 35 – 37] The Subpoena is specific as to account numbers. [CP 35 and 37] This suggests that, **before she settled her divorce case**, JOAN knew not only the location of the bank, but also the specific account numbers of the bank account complained of.

JOAN never alleged an affirmative misrepresentation by ROBERT as to their assets in this case. Rather, she has alleged a misrepresentation by failing to disclose an asset he had a fiduciary duty to disclose. It is granted that a spouse's fiduciary duty of full disclosure of assets in a divorce case does not depend necessarily upon the due diligence, or lack thereof, in the opposing attorney issuing subpoenas. In a case where the trial court found deliberate concealment of an asset in a divorce when the husband misrepresented an answer an Interrogatory dealing with disclosure of assets, the Division III Court of Appeals rejected the husband's counter-argument that wife's attorney lacked due diligence in failing to discover

the asset. Seals v. Seals, 22 Wash.App. 652, 590 P.2d 1301(Div. III, 1979) In that kind of a case, the aggrieved spouse is under no duty to issue Subpoenas or engage in extensive discovery, as they are entitled to rely upon the other spouse's final answer to Interrogatories. Id.

JOAN filed a reply declaration in support of her first motion to vacate that, for the first time, complained that ROBERT had "not furnished all or complete answers to the interrogatories requested by my attorney." [CP 169] This is the only reference in the record dealing with complaints about the discovery provided to JOAN by ROBERT. Court rules did not permit any response to this allegation that was filed one day before the hearing on the motion. The declaration did not allege that ROBERT had given a false or incorrect answer. Thus, the record before this Court does not suggest that this case is similar to the deliberate concealment of assets found in the Seals case.

The Division III Court of Appeals has gone on to distinguish Seals from a case where parties to a divorce engage in property valuations without the assistance of experts. In re Marriage of Maddix, 41 Wash.App. 248,703 P.2d 1062(Div. III, 1985). Citing In re the Marriage of Cohn, 18 Wash.App. 502, 569 P.2d 79(1977), the Maddix court

discussed the full disclosure rule mandated by the marital fiduciary relationship concluding that the “full disclosure mandated. . . assumes that one party has information which the other needs to know to protect his interests.” While it is true that the Maddix case posed an issue of failure to disclose a property value, as opposed to failure to disclose the existence of property, the Maddix court stated that if the wife in that case “had knowledge of the true value of the business, or at least sufficient notice to protect her interests prior to the entry of the final decree, it was incumbent upon her at that time to examine more closely that value before proceeding with the dissolution. If she voluntarily chose not to do so, she should not be allowed to return to court to do what should have been done prior to entry of the final decree.”

It is respectfully contended that such is the case at bar. JOAN knew of the existence of a specific bank account in her husband’s name at a specific out of state bank, albeit also bearing the name of her mother-in-law. She knew of this bank account at least the day before she agreed to settle her divorce, and probably well in advance. She was also aware of many transactions between ROBERT, his mother and the marital community involving hundreds of thousands of dollars throughout the

marriage. She knew about this not only by the fact that she herself had endorsed the checks from her mother-in-law, but also by declarations she filed in this divorce action showing that she knew of specific large transactions over a year prior to the settlement. JOAN also knew that the mortgage owed on one of the significant assets belonging to the marital community, i.e., the family home, had been paid off with \$95,577.54 in funds from the mother-in-law, and that the resulting equity remained subject to division by the trial court and which she agreed to split with her husband equally.

JOAN had sufficient notice and knowledge of the bank account in question in advance of her agreement to settle her divorce case sufficient to protect her interests in the divorce. She voluntarily entered into the settlement agreement with independent legal advice of an experienced family law attorney full well knowing of the issues.

5. *CR 60(b)(2) Motion to Vacate.*

ROBERT first contends that JOAN's motion to vacate based upon alleged mental incapacity or "unsound mind" is time-barred under CR 60(b) as it was not brought within one year of the entry of the Decree. This court must find that the trial court abused her discretion in failing to

find that JOAN was mentally incapacitated either on August 19, 2004 or at any other time. It has been pointed out that JOAN never raised the issue of her alleged incapacity in her first motion to vacate, which it should be noted was supported by a rebuttal declaration containing over 200 pages of declaration and exhibits prepared, for the most part, by JOAN herself. [CP 164-363] Curiously enough, said declaration was submitted in strict reply to ROBERT's response to the first motion, in November, 2004, but was not filed or made a part of the court record until January 26, 2005. [CP 164] As the trial court noted, this declaration appeared to be a cut and paste declaration drafted by JOAN herself and submitted with the assistance of her attorney. [CP 179-183] [RP, July 14, 2006, p. 18, lines 23 – 25 and p. 19, lines 1 thru 8]

The undersigned has found no case in Washington determining a CR 60(b)(2) motion to vacate a divorce consent decree. The Washington Supreme Court, in the case of Binder v. Binder, 50 Wn.2d 142, 309 P.2d 1050(1957), stated the rule for mental competency, as follows: "Mental competency is presumed; and in order to establish mental incompetency, fraud, or undue influence, the evidence must be clear, cogent, and convincing. Tecklenburg v. Washington Gas & Electric Co., 40 Wn. (2d)

141, 241 P. (2d) 1172. In the Binder case, speaking of the rules applicable to the question of undue influence, the court said:

In many cases where a contract or deed has been the subject of attack, it has been claimed that the party making such instrument was mentally incompetent so to do, and also was the victim of undue influence. It is recognized that a competent person may be subjected to undue influence and his conduct be governed thereby, though such a result is less likely in the case of a strong-minded person than one mentally weak and infirm. A person is regarded as mentally incompetent when he does not possess sufficient mind or reason to enable him to comprehend the nature, terms, and effect of the particular transaction in which he is engaged. He has been unduly influenced if the actor goes beyond persuasion, the influence exerted overcomes the will of the contractor or grantor, he is rendered incapable of acting upon his own motives, and his free agency is destroyed with reference to the particular transaction questioned. [Citing cases]

The Binder case, *supra*, dealt only with a motion to declare the invalidity of a deed on the basis of grantor's mental incapacity. The same rules of contract and deed apply. Therefore, to set aside a decree entered upon the basis of agreement of the parties, the Petitioner must prove lack of mental capacity to contract, fraud, undue influence or overreaching, by clear, cogent and convincing evidence.

The trial court simply did not abuse her discretion in failing to find evidence of JOAN's incapacity on August 19, 2004 or at any other time by the heightened civil standard of clear, cogent and convincing evidence. The trial court correctly concluded that this was more like a simple case of a litigant's buyer's remorse. [RP, July 14, 2006, p. 19, lines 13 – 25]

6. *CR 60(b)(1) Motion to Vacate.*

A judgment or decree entered by way of consent or stipulation of the parties cannot be collaterally attacked through the use of, or upon the grounds of, a CR 60(b)(1) motion. This is based upon all of the authority cited in Sections 2 and 3, *supra*. It is well settled law that this type of Decree is cannot be attacked on the basis of mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining the judgment or order.

7. *Trial Court Failure to Recuse Issue.*

It is disingenuous now, for the first time on appeal, for JOAN to argue that Judge Stolz should have recused herself from deciding both of her motions to vacate based upon the fact that Judge Stolz was the settlement judge.

The record is clear that JOAN, through her attorneys, waived this argument first, by bringing the first motion to vacate allowing Judge Stolz to decide that issue without complaint of any propriety. Secondly, JOAN has waived this argument by failing to request or insist that Judge Stolz recuse herself from deciding the second motion to vacate, when directly questioned and discussing the topic on the open record. [RP, July 14, 2006, p. 3, lines 12 – 25, and p. 4, lines 1 -23.

JOAN's legal memorandum did not directly call for Judge Stolz to recuse herself. The undersigned briefed the issue for the trial court, but only because it had been suggested by JOAN's attorneys that this was an issue. [CP 502-503] In any event, there was no affirmative request for Judge Stolz to recuse herself, and therefore, it cannot and should not be raised now for the first time on appeal.

*8. Husband's Failure to Disclosed Alleged Incapacity.*

Likewise, JOAN's attorneys are now claiming that ROBERT knew of her alleged mental incapacities at the time of settlement which, they argue, constituted a breach of his fiduciary duty to disclose her condition to the

court during the pendency of the divorce proceedings and at the time of settlement.

This issue was not raised in any of the trial court motions, nor was the issue briefed at the Superior Court level. Neither JOAN or any of her attorneys should be permitted to raise this issue now, for the first time on appeal.

Even if this Court is inclined to permit this argument to be made, the legal authorities cited by JOAN's counsel is distinguishable and misplaced. The case of Flaherty v. Flaherty, 50 Wn.2d 393, 312 P.2d 205(1957) was a motion to vacate brought by the wife after husband had secured a default order vacating a previous divorce decree taken by the wife on September 20, 1955. Despite this decree being taken upon the basis of the property settlement agreement between the parties, the husband nevertheless filed to vacate the Decree in late November, 2005. In the interim, the wife had suffered a severe stroke and was hospitalized, which was where she was served with husband's motion.

There were two different Superior Court Judges involved on the case, unbeknownst to each other, one that entered the divorce decree and

the other hearing the husband's motion to vacate. The day after his former wife was hospitalized, the husband signed the declaration in support of his motion to vacate, and at a time he knew his wife had had a stroke. The wife could not read, and had no assistance of anybody, much less legal counsel, to respond to husband's motion to vacate. The deputy sheriff sent out to serve the wife, failed to serve her, and the husband swore out a false declaration of service, successfully obtaining an order vacating the Decree. Once the two judges learned of their mutual involvement of the case, it took a different turn. The court held that it was incumbent upon the husband and his attorney to advise the Judge of facts which would have resulted in the appointment of a guardian ad litem.

Likewise, the case of In re the Welfare of Dill v. King Co. Superior Court, 60 Wn.2d 148, 372 P.2d 541(1962) was a proceeding for termination of the dependency of children. The mother of the children had been declared legally mentally ill **prior to** the proceeding in question. The father of the children and his attorney, both knew of her legal disability, but failed to inform the trial court of same. Thus, she was entitled to a guardian ad litem at the hearing in question, and under those circumstances, it was not sufficient that she was represented by counsel.

Obviously, this case is factually and legally distinguishable from these two cases cited by counsel.

As there were no evidentiary hearings on this issue in this case, it would be inappropriate for the undersigned to discuss what the undersigned knew or did not know regarding any alleged facts which warranted appointment of a guardian ad litem for JOAN. The issue is inappropriate to discuss for the first time on appeal, as it was not briefed or supported or opposed by declarations in the record. Certainly the ability of counsel in a divorce case is limited when the opposing party is represented by counsel, because of ethical prohibitions against contact with another party who is represented by counsel, it practically precludes the ability to have any direct meaningful contact with the opposing party to evaluate the issue of the other party's alleged incapacity in any event. This is especially so, given the fact that this motion was not filed until nearly two years after the divorce case settled.

Likewise, ROBERT has repeatedly stated that JOAN did not then, and does not now, suffer from any mental incapacity. [CP 485-488] JOAN's rehabilitation following her automobile collision was progressing satisfactorily, and was performing rather complicated job tasks, right up

until the time of their separation in June, 2003. [CP 528 – 530] She worked herself up to working 30 hours per week in the business within 7 or 8 months after the collision, doing all the things she did in the business before her injuries. [CP 584 and 585] Further, ROBERT was likewise precluded from having any meaningful contact or communication with his wife since the inception of litigation in June, 2003, as he was restrained from contact pursuant to Temporary Orders entered in the case. [CP 412] As a result, he lost any meaningful ability to assess or determine his wife's state of mind over one year later when he saw and interacted with her over a 4 hour period of time at the Settlement Conference.

## **CONCLUSION**

The issues before this court are also controlled by well-settled law that determines the outcome of motions to vacate or set aside orders under Rule 60 of the Washington Superior Court Civil Rules.

A trial court's ruling on a Motion to Vacate or Set Aside a Decree or Stipulation is within the sound discretion of the court. It appears to be well-settled that a collateral attack on a judgment or decree entered into by way of consent or stipulation of the parties, cannot be made by way of CR

60(b)(1) or based merely upon alleged mistake, irregularity, surprise or excusable neglect. This type of motion would be barred by the time limitations of CR 60(b), as the motions that specifically alleged these bases were not filed until over a year after not only the CR 2A Stipulation, but also the entry of the final Decree in this matter.

Likewise, JOAN's CR 60(b)(2) motion made upon the basis of alleged incapacity is time-barred under CR 60(b), unless this Court believes the trial court abused her discretion in failing to find, by clear, cogent and convincing evidence, that JOAN was incapacitated on August 19, 2004.

Motions to vacate under CR 60 are reviewed for an abuse of discretion. A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. Such motions are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion, i.e., only when no reasonable person would take the position adopted by the trial court.

The trial court determined that there was no breach of fiduciary duty to disclose the existence of an alleged asset, when the wife had

reasonable notice and knowledge of the alleged asset well in advance sufficient to protect her interest in the litigation. The wife settled her case despite that knowledge. There was no manifest abuse of discretion when the trial court concluded that the wife in this case suffered simply from a case of buyer's remorse and was trying to renege on her divorce settlement. The trial court decision denying the wife's first motion to vacate should be affirmed.

There was also no manifest abuse of discretion when the trial court declined to find any mental capacity on the date the divorce settlement was signed. Indeed, the trial court pointed to many facts which proved just the opposite. The trial court decision denying the wife's second motion to vacate should be affirmed as well.

The issue of whether the trial court should have recused herself from determining the two motions to vacate should be completely disregarded as it is being raised for the first time on appeal and was effectively waived at the hearing on the second motion to vacate.

Likewise, the issue of the husband's alleged failure to advise the court of any facts requiring the appointment of a guardian ad litme for the

wife should be completely disregarded as it is also being raised for the first time on appeal.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of July, 2007.

A handwritten signature in black ink, appearing to read "Kevin G. Byrd", written over a horizontal line.

KEVIN G. BYRD    WSBA 12894

Attorney for Respondent

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

*In re the Marriage of:*

No. 32839-9-II

**JOAN HELEN WRIGHT,**

**CERTIFICATE OF SERVICE**

*Appellant,*

*And*

**ROBERT DWAYNE WRIGHT,**

*Respondent*

I certify that on the 23<sup>rd</sup> day of July, 2007, I served and personally delivered a true, correct and legible copy of the "**Brief of Respondent**" upon the following parties to this proceeding and their attorneys or authorized representatives, as listed below.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23<sup>rd</sup> day of July, 2007.

  
WINDY FRAZIER